

5. Tomlin Properties effectively borrowed from the bank \$375,000 in the name of Erline Tomlin.
6. Tomlin falsified his Statement of Interest of Directors And Principled Shareholders to the Office of the Comptroller of the Currency (the “OCC”) since the loan would have put Tomlin over the legal lending limits.
7. The loss to the Bank on the Erline Tomlin loan was \$295,485.17.
8. The Bank was a wholly-owned subsidiary of Holding.
9. Holding was formed to own the Bank as its first bank, and later Bonham State Bank as a second bank.
10. Holding owned, at all relevant times, one hundred percent (100%) of all outstanding shares of the stock of the Bank.
11. Tomlin entered into a plea agreement with the United States of America (the “Plea Agreement”).
12. The Plea Agreement requires Tomlin to pay restitution to the FDIC as the receiver for the Bank.
13. The Plea Agreement does not require Tomlin to pay restitution to Holding.
14. The “Judgment In a Criminal Case” entered against Tomlin on June 6, 1995, in United States of America vs. Tomlin, Case No. CR 4:94cr35, in the United States District Court for the Eastern District of Texas (the “Criminal Judgment”) provided that restitution was only to be paid to and for the benefit of the FDIC as receiver for the Bank.
15. Tomlin has paid restitution to the FDIC, as the receiver for the Bank, and has been released from any further liability to the FDIC with respect to the Bank.

16. In an order entered March 3, 1994, the judge in the State Court Litigation found that a portion, but not all, of the claims asserted against Tomlin belonged to the FDIC and that the claims owned by the FDIC could not be asserted by Holding.
17. The judge in the State Court Litigation considered the Plea Agreement during the trial in that case.
18. The trial in the State Court Litigation resulted in a judgment against Tomlin on November 25, 1997.
19. Tomlin's participation in the State Court Litigation was limited. He did not actively participate in the case.

Further:
20. The Defendant Tomlin filed an answer to the state court lawsuit against him.
21. Tomlin did not appear at the trial whereupon the judgment of that court recites based on documents in evidence that "Tomlin and Harvard conspired to breach and, in fact, had breached fiduciary duties owed to WBBI. That such conduct was knowing and intentional, and was a direct and proximate cause of actual damages in the amount of \$295,485.17."
22. The state court awarded exemplary damages of \$1,000 and pre-judgment interest of \$306,204.17, plus post-judgment interest at ten percent (10%), on November 25, 1997.
23. Tomlin appeared and pled guilty to a crime involving the same basic set of facts.

CONCLUSIONS OF LAW

1. Collateral estoppel bars the retrial of issues already actually tried by the same parties.

2. In the case of Garner v. Lehrer (In re: Garner) 56 F.3d 677 (5th Cir.1995), the 5th Circuit Court of Appeals determined that a “post-answer default” suffices to fulfill the requirement of actual trial. In the case herein, Tomlin, having filed an answer, is bound by the actual trial and its consequences of collateral estoppel. The full faith and credit statute requires federal courts to give full faith and credit to state court judgments the same preclusive effect as the state courts apply. In Texas courts, collateral estoppel bars relitigation “of any ultimate issue of fact actually litigated and essential to the judgment in a prior suit.” Matter of Erlewine, 349 F.3d 205 (5th Cir. 2003).
3. The actual trial resulted in a judgment with state court fact findings of breach of fiduciary duty owed to WBBI. See matter of Davis, 3 F.3d 113 (5th Cir. 1993).
4. The actual trial also resulted in the state court judgment based on a fact finding that the conduct was knowing and intentional.
5. In the proceeding in the state court, the court found that evidence was presented. In this adversary proceeding, no evidence was produced by the Defendant Tomlin as to the facts tried by the state court. Id. Davis, 3 F.3d. 113 (5th Cir. 1993).
6. It is undisputed that Tomlin was a director of Willow Bend Bancshares from 1986-1990. The state court pleadings asserted breach of fiduciary duty and fraud. The judgment so found stating based upon evidence. See Moreno v. Ashworth, 892 F.2d 417 (5th Cir. 1990).
7. The Plea Agreement executed between the United States and Tomlin set forth in Exhibit 10 to pleadings in the file of the court, sets forth facts agreed upon in open court as to a fraudulent loan structured by Tomlin as a loan to his mother, a violation of Title 18,

Section 4 (misprision of felony). To this Tomlin pled guilty, and on page 6 of factual statement, he stated: "I know that my conduct was wrong, and it should not have taken place. I accept full responsibility for my offense and do not blame anyone else...."

8. The fraud found in the state court, and also the fraud admission in the federal court lead to the conclusion that Tomlin was guilty of defalcation as a fiduciary. He was a fiduciary as a director of WBBi, which owned the stock of Willow Bend Bank; he committed an intentional fraud on the subsidiary of the corporation in which he owed a fiduciary duty of honesty and fairness, thereby breaching that duty to the holding corporation.
9. Tomlin also, by the stated finding and his admission in the federal court, intended to defraud the Willow Bend Bank and intending its injury, he also intended to do that act and its injury to the holding company. He did so not by a representation of financial condition, but as to his mother being the borrower, which she was not. Texas v. Walker, 142 F.3d 813 (5th Cir. 1998); Kawaauhau v. Geiger, 523 U.S. 57, 118 S. Ct. 974; 149 L. Ed. 2d 90. The 5th Circuit in Walker stated "if a debtor acts with an actual intent to cause injury, the debt is non-dischargeable under Sec. 523 (a) (6)...."
10. Tomlin is bound by collateral estoppel as to the state and federal courts proceedings wherein he participated in trials actively, and the results were as above found. Tomlin is in violation of 11 U.S.C. § 523 (a) (4) and (a) (6), and the debt is non-dischargeable.

All other relief is denied. (fla)